No. 80-1702

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In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN B. NICOSIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

Cases

	PAGE
Berenyi v. Immigration Director, 385 U.S. 630 (1967)	2
Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962)	3
Hoffa v. United States, 385 U.S. 293 (1966)	2
Napue v. Illinois, 360 U.S. 264 (1959)	2
Sorrells v. United States, 287 U.S. 435 (1932)	3
United States v. Demma, 423 F.2d 981 (9th Cir. 1975)	2-3
United States v. Johnston, 426 F.2d 112 (7th Cir. 1970)	2

Constitution

U.S. Const., Article III, Section 2, Clause 3	2, 3
U.S. Const., Amendment VI	2, 3

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The Government describes the Petitioner as the recipient of an illegal one million dollar "kickback" (Memorandum, p. 2), in the face of a jury verdict finding him "Not Guilty" on the Government charge relating to that very money. (Indictment, Count I; Memorandum, p. 1.)

Having adjudged the Petitioner guilty of an offense on which the jury found him "Not Guilty", the Government proceeds to use that conclusion as a predicate to justify judicial preemption of the jury function on the obstruction of justice charge on which Petitioner was convicted.

The Government Memorandum, like the opinion of the Court of Appeals, demonstrates on its face that the test applied in this case was not whether the record showed some evidence of entrapment, but whether the panel judges believed either the defendant's lack of predisposition or his explanation of the tape-recorded conversation on which the entrapment issue turned. (Petitioner's App., at 5; Memorandum, p. 3-4.)

This weighing of the evidence by judge rather than by jury forms the core of Petitioner's complaint.[1] The district judge and the court of appeals, and now the Government in this Court, seek to substitute their judgment for that of a jury on the central factual issue in the case, thus depriving Petitioner of his right to a trial by jury, guaranteed by the Constitution. Article III, §2, cl. III and Amendment VI.

The plain fact, evident on the face of both the court of appeals decision and the Solicitor General's Memorandum, is that the district court preempted the critical jury function at trial. It did so because the defendant would not admit his guilt as required by the Seventh Circuit *Johnston* rule. *United States* v. *Johnston*, 426 F.2d 112 (7th Cir. 1970). (*See*, 426 F.2d 112; Petitioner's App., at 15.)

Petitioner was denied his right to a trial by jury on the critical issue presented at his trial because the Seventh Circuit maintains fidelity to a rule of law that is in conflict with the rule in other circuits, *United States* v. *Demma*, 423

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[1] The Solicitor General's reliance upon the "two-court" rule of *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967), is misplaced. Not only are constitutional claims here raised (*see, e.g. Napue* v. *Illinois*, 360 U.S. 264, 271, 272; *Cf. Hoffa* v. *United States*, 385 U.S. 293), but the defect here complained of is not in the facts found, but in who performed the fact finding process. *Berenyi, supra*, at 635-636.

F.2d 981 (9th Cir. 1975), *Hansford* v. *United States*, 303 F.2d 219, 221 (D.C. Cir. 1962) (en banc), and with the law as stated by this Court (*Sorrells* v. *United States*, 287 U.S. 435 (1932).

The question presented is not whether the Government or any Court believes the defendant guilty or not guilty of the offense on which he was convicted; the question presented is whether judges may in effect make such a determination where the Constitution assigns that function to a jury. Article III, §2 cl. III and Amendment VI.

WHEREFORE, Petitioner prays issuance of the Writ and reversal of the judgment below.

Respectfully submitted,

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